Norsyamsi bin Wahid & Anor v KL Eco City Sdn Bhd (TY Lin International Sdn Bhd, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-601–11 OF 2017
MOHD FIRUZ J
11 OCTOBER 2023

Tort — Negligence — Damages — Collapse of bridge caused first plaintiff to suffer serious injury — Plaintiffs filed suit against defendant for damages — Defendant commenced third party proceeding against third party — Whether plaintiffs' claim on damages should be allowed — Whether defendant's third-party claim against third party should be allowed

The defendant was the owner of the KL Eco City project which amongst others involved the construction of the pedestrian bridge linking the project and The Gardens Mall. The defendant had appointed Tuck Sin Engineering & Construction Sdn Bhd ('Tuck Sin') as the main contractor for the project. Tuck Sin then appointed CLT Contract Sdn Bhd ('CLT') as the ceiling contractors. The first plaintiff was employed by CLT as a ceiling installer for the project. The second plaintiff was an Indonesian citizen residing in Malaysia lawfully and was the first plaintiff's wife. TY Lin International Sdn Bhd ('the third party') was the consultant structural and civil engineer for the project appointed by the defendant. On 30 November 2016 whilst the first plaintiff was installing ceiling, the structure of the link bridge, which was still under construction, suddenly collapsed and the first plaintiff was 'thrown out' and fell. As a result of the incident, the first plaintiff suffered serious injury and subsequently needed a full-time care and or part-time care. The plaintiffs thus commenced proceedings against the defendant and Tuck Sin. An earlier suit was filed by the defendant against Tuck Sin and its subcontractor ie Hercules ('the first suit'). The first suit was dismissed where the High Court held that the collapse of the bridge was more probably caused by the third party. The defendant's appeal to the Court of Appeal was also dismissed. The decision of the Court of Appeal prompted the plaintiff to withdraw the suit against Tuck Sin and led to the defendant commencing a third party proceeding against the third party. The third party contended, inter alia, that: (a) they were not in breach of any duty in contract and in tort; and (b) the High Court judgment was not binding on them as the remarks did not form the ratio of the case and were obiter.

Held, allowing the plaintiff's claim in part and dismissing the defendant's third-party claim:

(1) There was a relationship of principal and agent between the defendant and the third party. While the defendant had submitted extensively the third party was an independent contractor not their agent, the judgment in the first suit had already put this issue to rest. Since there was no appeal by the defendant to the findings, the defendant was bound by the decision. A sum of RM218,000 was awarded compared to the plaintiff's claim of RM295,000. With reference to the issue of contributory negligence raised by the defendant, there was insufficient evidence to suggest that the injuries suffered by the first plaintiff would not have happened or been mitigated if he had attached his safety harness to the scaffolding prior to the collapsed of the bridge. On the issue of the first plaintiff's loss of actual earnings, some of the documentation may not be perfect to support the plaintiff's claim in the sum of RM182,500 and thus the sum of RM121,666.67 was allowed. With reference to the cost of future operation, a sum of RM5,000 was allowed being the costs for removing screws and incidentals thereto and RM5,000 for pain and suffering. For cost of care and the second plaintiff's loss of earnings, instead of allowing the full sum of RM69,350 as claimed by the second plaintiff, the sum was deducted 50% from the amount claimed due to the lack of documentation to prove the second plaintiff's actual salary and the sum allowed was RM34,675. For the costs of prosthesis, since both types of prosthesis arm suggested by the plaintiffs and defendant's expert would not be able to put the plaintiff back to his original condition, the first plaintiff would require assistance both physical and monetary assistance for the rest of his life be that by his wife or children or a helper as the case may be. As it was not possible to place the plaintiff in a position closest to his original state, an award of damages in the sum of RM1.2m would suffice (see paras 31–32, 36–39, 41–42 & 44).

(2) As the third party was not a party to the proceedings in the first suit and that the issue of whether the third party was responsible for the collapse of the bridge was not an issue for determination before the High Court, the judgments of the High Court and the Court of Appeal could not be made to bind the third party. Whatever was said against the third party was only obiter dicta and did not amount to a binding conclusion on them. The principles of res judicata as relied upon by the defendant could not be made to apply in a case such as the present suit given the fact that the third party was never given an opportunity to defend itself as a party to the first suit. This trampled on the rules of natural justice. There was also no evidence adduced, apart from the decision in the first suit, to prove that the third party was at fault for the collapse of the bridge or liable for negligence in contract or in tort (see paras 46–49).

[Bahasa Malaysia summary

Defendan adalah pemilik projek KL Eco City yang antara lain melibatkan pembinaan jambatan pejalan kaki yang menghubungkan projek tersebut dengan The Gardens Mall. Defendan telah melantik Tuck Sin Engineering & Construction Sdn Bhd ('Tuck Sin') sebagai kontraktor utama untuk projek tersebut. Tuck Sin kemudian melantik CLT Contract Sdn Bhd ('CLT') sebagai kontraktor siling. Plaintif pertama telah diambil bekerja oleh CLT sebagai pemasang siling untuk projek tersebut. Plaintif kedua adalah seorang warganegara Indonesia yang menetap secara sah di Malaysia dan merupakan isteri kepada plaintif pertama. TY Lin International Sdn Bhd ('pihak ketiga') adalah jurutera perunding struktur dan awam bagi projek tersebut yang dilantik oleh defendan. Pada 30 November 2016, semasa plaintif pertama sedang memasang siling, struktur jambatan penghubung, yang masih dalam pembinaan, tiba-tiba runtuh dan plaintif pertama telah 'terpelanting' dan jatuh. Akibat insiden tersebut, plaintif pertama mengalami kecederaan serius dan kemudiannya memerlukan penjagaan sepenuh masa atau separuh masa. Oleh itu, plaintif telah memulakan prosiding terhadap defendan dan Tuck Sin. Satu saman terdahulu telah difailkan oleh defendan terhadap Tuck Sin dan subkontraktornya iaitu Hercules ('tuntutan pertama'). Tuntutan pertama telah ditolak di mana Mahkamah Tinggi memutuskan bahawa keruntuhan jambatan tersebut lebih berkemungkinan disebabkan oleh pihak ketiga. Rayuan defendan ke Mahkamah Rayuan juga ditolak. Keputusan Mahkamah Rayuan telah mendorong plaintif untuk menarik balik tuntutan terhadap Tuck Sin dan membawa kepada defendan memulakan prosiding pihak ketiga terhadap pihak ketiga. Pihak ketiga berhujah, antara lain, bahawa: (a) mereka tidak melanggar sebarang kewajipan dalam kontrak dan tort; dan (b) penghakiman Mahkamah Tinggi tidak mengikat mereka kerana kenyataan tersebut tidak membentuk ratio kes dan hanyalah obiter.

Diputuskan, membenarkan sebahagian tuntutan plaintif dan menolak tuntutan pihak ketiga defendan:

(1) Terdapat hubungan prinsipal dan ejen antara defendan dan pihak ketiga. Walaupun defendan berhujah secara meluas bahawa pihak ketiga adalah kontraktor bebas dan bukan ejen mereka, penghakiman dalam tuntutan pertama telah menyelesaikan isu ini. Oleh kerana defendan tidak membuat rayuan terhadap penemuan tersebut, defendan terikat dengan keputusan itu. Sebanyak RM218,000 adalah dianugerahkan berbanding tuntutan plaintif sebanyak RM295,000. Berhubung isu kecuaian sumbangan yang dibangkitkan oleh defendan, tiada keterangan yang mencukupi untuk menunjukkan bahawa kecederaan yang dialami oleh plaintif pertama tidak akan berlaku atau dapat dikurangkan jika beliau telah memasang tali keselamatan pada perancah sebelum jambatan runtuh. Mengenai isu kehilangan pendapatan sebenar plaintif pertama, beberapa dokumen mungkin tidak sempurna

untuk menyokong tuntutan plaintif sebanyak RM182,500, dan jumlah RM121,666.67 dibenarkan. Bagi kos pembedahan masa depan, jumlah RM5,000 dibenarkan untuk kos mengeluarkan skru dan perkara berkaitan serta RM5,000 untuk kesakitan dan penderitaan. Bagi kos penjagaan dan kehilangan pendapatan plaintif kedua, jumlah penuh RM69,350 yang dituntut oleh plaintif kedua ditolak sebanyak 50% kerana kekurangan dokumentasi untuk membuktikan gaji sebenar plaintif kedua, dan jumlah RM34,675 dibenarkan. Bagi kos prostesis, memandangkan kedua-dua jenis lengan prostesis yang dicadangkan oleh pakar plaintif dan defendan tidak dapat mengembalikan plaintif kepada keadaan asalnya, plaintif pertama akan memerlukan bantuan fizikal dan kewangan sepanjang hayatnya, sama ada daripada isteri, anak-anak, atau pembantu. Oleh kerana adalah tidak mungkin meletakkan plaintif dalam keadaan paling hampir dengan keadaan asalnya, ganti rugi berjumlah RM1.2 juta adalah mencukupi (lihat perenggan 31–32, 36–39, 41–42 & 44).

(2) Memandangkan pihak ketiga bukan pihak dalam prosiding dalam tuntutan pertama dan isu sama ada pihak ketiga bertanggungjawab atas keruntuhan jambatan bukan isu untuk ditentukan di hadapan Mahkamah Tinggi, penghakiman Mahkamah Tinggi dan Mahkamah Rayuan tidak boleh mengikat pihak ketiga. Apa sahaja yang dinyatakan terhadap pihak ketiga hanyalah obiter dicta dan bukan merupakan kesimpulan yang mengikat mereka. Prinsip res judicata yang disandarkan oleh defendan tidak boleh diterapkan dalam kes seperti tuntutan semasa memandangkan pihak ketiga tidak pernah diberi peluang untuk mempertahankan diri sebagai pihak dalam tuntutan pertama. Ini melanggar peraturan keadilan semula jadi. Tiada juga keterangan yang dikemukakan, selain daripada keputusan dalam tuntutan pertama, untuk membuktikan bahawa pihak ketiga bersalah atas keruntuhan jambatan atau bertanggungjawab atas kecuaian dalam kontrak atau tort (lihat perenggan 46–49).]

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 64, HC (refd)

Chan Yung Sheng v Zakaria bin Awang [2019] 10 MLJ 506, HC (refd)

Chua Kay Hock & Anor v Lee Hoon Poi [2022] 6 MLJ 88, CA (refd)

Chua Kim Suan (Administratrix of the Estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394, SC (refd)

Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor [2020] 5 MLJ 185, FC (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

A *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction SDN BHD & Anor* [2020] MLJU 435, HC (refd)
Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133, FC (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)
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Nana Ofori Atta II, Omanhene of Akyem Abuakwa and Another v Nana Abu Bonsra II As Adansehene, And As Representing The Stool of Adanse, and Another [1957] 3 All ER 559, PC (refd)
North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (distd)
C
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)
Tan Phaik See v Multi Purpose Insurance Berhad [2004] 6 MLJ 474; [2004] 7 CLJ 289, HC (refd)
Thien Kon Thai, Re [2008] 6 MLJ 278 (refd)
D
Thoday v Thoday [1964] 1 All ER 341, CA (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24, FC (folld)

Legislation referred to

E Occupational Safety and Health Act 1994

(Ranizan Abdullah & Assoc) for the plaintiff.
(Raja Darryl & Loh) for the defendant.

F **Mohd Firuz J:**

[1] The following is the court's decision at the end of a full trial between the parties. Trial commenced on 17 September 2019 and was concluded on 10 March 2023. During the trial, a total of 13 witnesses were called, with the
G plaintiff having called ten witnesses, the defendants having called two witnesses and one witness from third party to testify.

[2] Having gone through the pleadings of all parties, the evidence adduced at the trial both oral and documentary, and upon reviewing the submissions of
H counsel, this court had on 11 October 2023 allowed the plaintiff's claim against the defendant in part. The defendant's third party proceeding was also dismissed.

I **[3]** The defendant has since lodged an appeal against the above decision by way of a notice of appeal dated 10 November 2023 to the Court of Appeal. The following are my grounds of judgment in relation to the said appeal.

PARTIES TO THE SUIT

[4] At all material times, the first plaintiff was employed by CLT Contract Sdn Bhd ('CLT'), the subcontractor for plaster ceiling works for the KL Eco City Bridge Project.

[5] The second plaintiff is an Indonesian citizen (Passport No A 5177768) residing in Malaysia lawfully. She is the first plaintiff's wife.

[6] The first defendant is the owner of the KL Eco City Project which amongst others involved the construction of the pedestrian bridge linking the KL Eco City Project and the Gardens located at the Mid Valley Mall ('the KL Eco City Project'.

Note: The defendant had appointed Tuck Sin Engineering & Construction Sdn Bhd ('Tuck Sin) as the main contractor for the Project. It was Tuck Sin who appointed CLT as the ceiling contractors.

[7] The third party is the consultant structural and civil engineer (bridge designer) for this project appointed by the defendant.

BRIEF FACTS

[8] The factual matrix of the plaintiff's claims are as follows:

(a) the first plaintiff works as a ceiling installer for the Eco City KL Project under a contract for service either employed directly by CLT Contract Sdn Bhd or through an individual named Ramli;

(b) on 30 November 2016, at about 3.30pm, whilst the first plaintiff was installing ceiling at level 4 of a nearby Tower, the structure of the Link Bridge (linked Eco City Project to The Gardens Mall) which was still under construction suddenly collapsed. Due to the vibration resulting from the collapse, the first plaintiff was 'thrown out' and fell from where he was;

(c) as a result of the incident, the first plaintiff suffered serious injury and subsequently needed a full-time care and or part-time care; and

(d) the injuries suffered by the first plaintiff and the aftermath to it, caused both plaintiffs to commence proceedings against the defendant and its main contractor: Tuck Sin Engineering Sdn Bhd.

[9] It is to be noted that this suit is very much related to an earlier suit: KLHC Suit No WA-22C-38–03 of 2017, filed by the defendant herein (KL

Eco City Sdn Bhd) against ('the first suit') Tuck Sin and its subcontractor: Hercules as the subcontractor who designed, supplied and installed the bearings for the Link Bridge.

[10] On 25 October 2019, after hearing submissions at the end of a full trial, Lee Swee Seng J dismissed the first suit against both Tuck Sin and Hercules were dismissed. KL Eco City's appeal to the Court of Appeal against the High Court decision was also dismissed.

[11] The above decision of the Court of Appeal prompted the plaintiff herein to withdraw the suit against Tuck Sin and led to the defendant herein commencing a third party proceeding against the third party herein.

THE PLAINTIFF'S PLEADED CASE

[12] The plaintiffs' case can be summarised as follows:

(a) the collapse of the link bridge is as a result of the negligence of the defendant and/or any agent, employee, servant, and or any individual that has been given the rights by the defendant to execute and or complete the KL Eco City Project;

(b) as a result of the incident, the first plaintiff suffered serious injury and subsequently needed a full-time care and or part-time care;

(c) before the incident, the first plaintiff had no health issues and was physically healthy. He also had a full-time job. As a result of the incident, the plaintiff was unable to work and suffered loss of earnings;

(d) due to the same incident, the second plaintiff had to take unpaid leave to take care of the first plaintiff; and

(e) the plaintiffs' claims against the defendant include for all the injuries suffered by the first plaintiff, loss of earning, loss of amenities of life, medical cost, cost for prosthetic arm including the maintenance thereof, and any claims as a result of the negligence of the defendant and/or any agent, employee, servant and or any individual that has been given the rights by the defendant to execute and or complete the KL Eco City Project and thereby causing the collapse of the bridge.

THE DEFENDANT'S CASE

[13] In a nutshell, the defendant's case against the plaintiff is as follows:

(a) the defendant does not owe a duty of care to the plaintiffs as there is no proximity of relationship between them. There was also no breach of duty of care by the defendant;

(b) there breach of statutory duty under the Occupational Safety and Health Act 1994 on the part of the defendant against the plaintiff;

(c) the doctrine of *res ipsa loquitor* is not applicable to the present case;

(d) the plaintiff's claims for special damages are defective;

(e) the second plaintiff's claim against the defendant is unsustainable in law and/or in fact on the ground of illegality as she remained in Malaysia under a social visit pass which contains an express condition prohibiting her from any form of employment.

(f) the first plaintiff's claim against the defendant for loss of earnings is not proven;

(g) the first plaintiff's claim for a state of the art bionic prosthetic arm is inappropriate and unreasonable;

(h) the first plaintiff's claim of traveling charges for follow-up treatments amounting to RM150 is unsustainable due to the absence of evidence or proof of payment; and

(i) that the first plaintiff is guilty of contributory negligence as he did not hook his safety harness/belt onto the nearby structure while he was on the scaffolding at the material time.

THE DEFENDANT'S CASE AGAINST THE THIRD PARTY

[14] As narrated earlier, the plaintiff had appointed the third party as the structural and civil engineer (Bridge Designer) for this Project. It is an undisputed fact that the bridge was designed by the third party.

[15] The bridge collapsed on 30 November 2016 causing the first and second plaintiff to suffer loss and damages ('the Accident').

[16] In KLHC Suit No WA-22C-38–03 of 2017, KL Eco City Sdn Bhd (the plaintiff herein) against Tuck Sin as the main contractor and Hercules as the subcontractor who designed, supplied and installed the bearings for the Link Bridge ('the first suit'), Justice Lee Swee Seng held that the collapse of the bridge was more probably caused by the third party. Accordingly, KL Eco City's suit against both Tuck Sin and Hercules was dismissed.

[17] KL Eco City's appeal to the Court of Appeal against the High Court decision was also dismissed. In light thereof, KL Eco City, being the defendant herein, takes the position that the third party is bound by the findings of the High Court and Court of Appeal decision notwithstanding the fact that the third party was not a party to both the first suit and the appeal to the Court of Appeal based on the doctrine of res judicata.

[18] It is the defendant's contention that the third party is *estopped* by its conduct from contending that HC decision and COA decision purportedly had no binding effect on them for the following reasons:

(a) not only that the third party was fully aware of Tuck Sin's and Hercules' pleaded case in the first suit, the third party had in fact actively participated and/or involved in the first suit as the third party was given the opportunity to defend itself and its design as evident from the extent of its involvement and participation in the first suit including testifying as a witness;

(b) knowing that it had substantial interests and would be *directly affected* by the outcome of the first suit, the third party could and ought to have intervened in the first suit.

(See: *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52.);

(c) the third party's design of the Link Bridge was the subject matter of Tuck Sin's and Hercules' pleaded case in the first suit whereby both Tuck Sin and Hercules had heavily criticized and blamed the third party for its design as the cause of the collapse;

(d) as a result, the High Court's determinations of Tuck Sin's and Hercules' pleaded case would certainly have a significant bearing on the third party's legal and commercial interests, especially on the third party's reputation and liability in respect of the collapse;

(e) however, the third party knowingly stood by and watched the defendant defending its design of the Link Bridge against Tuck Sin and Hercules, and chose not to intervene and make itself a party to defend the case by itself, even though the third party's own witness. Ir. Lim acknowledged that the third party had the chance to do so, In fact, the third party *chose* to rely on the defendant to fight the battle and to clear its name on its behalf;

(f) thus, the third party is bound by the HC decision and COA decision on the third party. The third party's failure to intervene and make itself a party to defend itself in the first suit and its wilful choice in relying on the defendant to fight its battle/ vindicate its name on its behalf, is not an excuse to distance itself from the findings made in the HC decision and COA decision reliance placed on the following authorities:

(i) *Nana Ofori Atta II, Omanhene of Akyem Abuakwa and Another v Nana Abu Bonsra II As Adansehene, And As Representing The Stool of Adanse, and Another* [1957] 3 All ER 559;

(ii) Court of Appeal's decision in *Re Thien Kon Thai* [2008] 6 MLJ 278.

(g) the third party had the liberty to apply to the courts to expunge or set aside those parts of the HC decision and/or the COA decision which

concern the third party's liabilities or responsibilities with regard to the cause of the collapse. It is trite that the courts have inherent jurisdiction to expunge or set aside remarks made in a judgment as held by the Federal Court in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501;

(h) however, the third party did not or chose not to take any steps to apply to expunge the parts of the HC decision and/or the COA decision which concern the third party's liabilities or responsibilities towards the collapse; and

(i) therefore, there is no basis for the third party to now deny the effect of the findings made in the HC decision and the COA decision which implicates the third party pertaining to the cause of the collapse.

[19] The defendant further contends that:

(a) they are not estopped from bringing the third party proceedings herein against the third party. In this regard, the defendant contends that there was no representation made to the third party that they will not be held liable or responsible for the collapse of the bridge;

(b) the defendant did not make an election of suing Tuck Sin and Hercules instead of the third party in the first suit. The decision to do so was based on the investigation reports prepared by the defendant's consultant and CIDB which showed that the cause of the collapse was attributable to Tuck Sin and Hercules;

(c) the third party proceeding was commenced only after the Court of Appeal decision which affirmed the High Court decision that the third party was responsible for the collapse of the bridge; and

(d) despite the third party testifying as a witness for the defendant in the first suit, the principle of witness immunity is inapplicable in the present suit.

[20] Based on the decision of the High Court and Court of Appeal in the first suit, the third party is liable to contribute and/or indemnify the defendant against the whole of the plaintiff's claim. Applying the proximity and neighbourhood test, the third party owed a duty of care towards the defendant including any other third party involved in the Project.

A THE THIRD DEFENDANT'S PLEADED CASE

[21] Based on the defendant's statement of claim ('SOC') against the third party, there are three causes of action which the third party has to defend namely:

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(a) that the collapse of the bridge was caused by the failure of the third party;

(b) that there was a breach of contract by the third party; and

(c) that there was a breach of duty in the tort negligence.

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[22] It is also the defendant's case against the third party that the latter is liable to contribute and/or indemnify the defendant against the whole of the plaintiff's claim arising from the collapse 'which was caused by the third party's design failure and lack of supervision as held in the decision of both the High Court and the Court of Appeal.

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[23] During the trial, the defendant based its case almost entirely on the statements made in the High Court grounds of judgment dated 25 October 2019. No other evidence was adduced to establish the alleged breaches committed by the third party.

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[24] In short, the third party's position can be summed up as follows:

(a) they were not in breach of any duty in contract and in tort;

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(b) the judgment dated 25 October 2019 is not binding on them as the remarks did not form the ratio of the case and were obiter;

(c) the defendant had elected not to sue them in the first suit wherein the third party's representative Ir Lim Kit Seong was called as the defendant's witness. This is tantamount to an election as to the parties to be sued. This operates as a cause of action estoppel against the defendant. By way of the doctrine of election, the defendant is estopped from seeking contribution and indemnity against the third party for the bodily injury claim brought by the plaintiffs; and

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(d) the third party could not have intervened after Ir Lim Kit Seong gave evidence on behalf of the defendant.

[25] The third party also took the position the defendant is not entitled to raise in their witness statement that the inclusion of the 25 October 2019 judgment in Part A of the documents constitutes an admission by the third party that the collapse of the bridge was attributed to them when:

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(a) the alleged admission was not pleaded in the defendant's statement of claim against them;

(b) the alleged admission was not posed to Lim Seong Kit in cross-examination;

(c) the inclusion in Part A was confirmed by this honorable court; and

(d) the third party has maintained a consistent and unwavering stand that it was not liable for the collapse.

[26] The third party also took the position that the law does not impose a duty on a non-party to a suit to expunge obiter statements made on him.

[27] The defendant's suit against the third party for contribution and indemnity arising out of the bodily injury claim by the plaintiffs and not for all of its alleged losses arising out of the collapse of the bridge is due to the reason that they do not hold the third party liable for the collapse as they would not have been able to prove so if the matter was litigated in full. Hence, the only way for the defendant to overcome this issue was to say that the 25 October 2019 judgment is binding on the third party and to say that the matter was fully litigated.

THE COURT'S ANALYSIS AND FINDINGS ON THE PLAINTIFF'S CAUSE OF ACTION

[28] The present case before me involves a mishap which took place in November 2016 whilst the first plaintiff was working. The ceiling at the podium attached to the pedestrian bridge that links KL Eco City to the Garden Mall due to unforeseen circumstances the bridge overturned and collapsed as a result the plaintiff here lost his upper limb. The second plaintiff is the wife of the first plaintiff and the defendant here is the developer and owner of KL Eco City.

[29] By way of third party proceeding the defendant brought in TY Lin as a third party. TY Lin was the party responsible for part of the design of the bridge. The cause of the collapse was dealt with in the first suit wherein KL Eco City Sdn Bhd (the defendant in the present suit) commenced an action against Tuck Sin (the main contractor for the Project) and Hercules (the subcontractor to Tuck Sin, who was responsible for the design, supply and install the bearings for the Link bridge). At the end of the first suit, Lee Swee Seng J (as he then was) dismissed KL Eco City's suit against Tuck Sin and Hercules. This decision was subsequently held by the Court of Appeal.

[30] In this suit, the plaintiffs commenced action for injuries suffered as the result of the collapse. While my decision will be rather simple the magnitude of it will be quite far reaching.

[31] Firstly, it is my finding that there is a relationship of principal and agent between the defendant and the third party. While I do take cognisance to the fact that the defendant has submitted extensively the third party is an independent contractor not their agent, I am of the view that the judgment of Lee Swee Seng J in the first suit had already put this issue to res. This can be seen at paras 172–175 of his judgment in *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction SDN BHD & Anor* [2020] MLJU 435 (pp 22–23) which is re-produced below:

> [172] It is only too obvious that if TYL had allowed for redundancy in its design of the bridge, the collapse could have been avoided and this is true even if B3 had failed first. I agree with the defendants that the bridge would still be standing and the relevant parties would have had the opportunity to rectify the bridge and avoid the catastrophic collapse.
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> [173] There was some debate as to whether TYL is an agent of the plaintiff such that the plaintiff as principal would be liable for and be bound by the acts of its agent. Learned counsel for the plaintiff submitted that TYL as a specialist consulting engineer in the design of bridges is an independent contractor.
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> [174] As I had held that the plaintiff had not proved that the defendants are liable in tort, then the question of whether TYL is the agent of the plaintiff is not really relevant in the determination of liability.
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> [175] Suffice for me to say that I am more inclined to find TYL as the plaintiff's agent as at the end of the day, though they are professionals in their own right but that they were taking directions from the plaintiff with respect to what the plaintiff wanted. TYL's input is clearly technical not unlike that of a solicitor who would be professionally liable as an agent for his client and payment to an agent would be as good as payment to the principal.

[32] It is pertinent to note that there was no appeal by KL Eco to the above findings. Ipso facto, the KL Eco @ the defendant herein, is bound by the above decision. In fact, for purposes of the present suit, both the plaintiff and the defendant had agreed that they are bound by the above decision.

[33] Based on the above finding, I have reviewed the amount quantified by the plaintiff which adds up to the sum of RM3,249,426.50 (see table at para 103 of the plaintiffs' written submission dated 20 December 2022):

No	ITEM	AMOUNT (RM)
1	General damages for the injuries suffered and loss of amenities of life	295,000
2	First plaintiff's loss of actual earning	182,500
3	Cost of future operation/procedure	42,000
4	Prosthesis	2,654,674
5	Cost of care/second plaintiff's loss of earning	69,350.

No	ITEM	AMOUNT (RM)
6	Special Damages	5,902.50
	Total:	3,249,426.50

[34] Part of the plaintiff's above claim includes the sum of RM295,000 for injuries suffered. The breakdown for this amount can be seen in the schedule below:

No	Injuries	Amount of Compensation Claimed in Plaintiffs' Submissions
1	Mangled left upper limb at the level of mid forearm-crush injury of the left injury of the left upper limb at the level of the forearm (open fracture left radius ulna)	RM70,000
2	Pelvis fractures-right ilium fracture extending to the posterior column acetabulum and superior pubic ramus	RM65,000
3	Right femoral head fracture	RM50,000
4	Left calcaneal hairline fracture	RM20,000
5	Closed fracture left medial malleolus	RM27,000
6	Laceration wound over the heel around 1 cm with bone exposed	RM8,000
7	Abrasion wounds over the lateral aspect of the ankle	RM8,000
8	Multiple scars	RM25,000
9	Muscle wasting	RM12,000
10	Predisposed to secondary osteoarthritis	RM10,000
	Total	RM295,000

[35] The following table, illustrates the amount claimed by the plaintiff as against the amount proposed by the defendant:

No	Injuries	Amount of Compensation Claimed in plaintiffs' Submissions	Defendant's Amount
1	Mangled left upper limb at the level of mid forearm-crush injury of the left injury of the left upper limb at the level of the forearm (open fracture left radius ulna)	RM70,000	Nil as it was not pleaded
2	Pelvis fractures- right ilium fracture extending to the posterior column acetabulum and superior pubic ramus	RM65,000	Nil as it was not pleaded
3	Right femoral head fracture	RM50,000	Nil The first plaintiff had failed to prove that the injuries were suffered as a result of the incident
4	Left calcaneal hairline fracture	RM20,000	RM1,000
5	Closed fracture left medial malleolus	RM27,000	RM20,000
6	Laceration wound over the heel around 1 cm with bone exposed	RM8,000	RM2,000
7	Abrasion wounds over the lateral aspect of the ankle	RM8,000	RM2,000
8	Multiple scars	RM25,000	RM5,000 to RM8,000
9	Muscle wasting	RM12,000	RM3,000 to RM7,000
10	Predisposed to secondary osteoarthritis	RM10,000	RM5,000
	Total	RM295,000	

[36] Respectfully, I do not agree with some of the amount claimed by the plaintiff nor the amount proposed by the defendant. My analysis is as follows:

(a) based on the medical evidence given by the plaintiff's expert, there the first plaintiff did suffer injuries in the form of a mangled left upper limb at the level of mid forearm, crush injury of the left injury of the left upper limb at the level of the forearm (open fracture left radius ulna). In this regard, this court finds that the RM70,000 claimed by the plaintiff for this injury is reasonable;

(b) this court also finds that the first plaintiff suffered pelvis fractures right ilium fracture extending to the posterior column acetabulum and superior pubic ramus. This court finds that the amount of RM65,000 claimed by the plaintiff is reasonable;

(c) in so far as the claim for right femoral head fracture in the sum of RM50,000, this court agrees with the defendant's submission that there is no evidence to support that the injury was caused by the collapse of the bridge. In fact, the plaintiff's expert, Dr Manukaran only saw the first plaintiff 6 months after the accident and the x-rays reveal that there was no such injury at that point of time. Hence, this court declines to make an award under this heading;

(d) this court finds there was injury in the form of a left calcaneal hairline fracture amount claim is RM20,000. Be that as it may, this court concludes that the amount claimed is rather excessive. This court is awarding a sum of RM10,000;

(e) this court finds that there was injury in the form of a closed fracture left medial malleolus. This court is of the view that the sum of RM27,000 claimed is reasonable;

(f) this court finds that there was a laceration wound over the heel around 1cm with bone exposed. This court is of the view that the sum of RM8,000 claimed is reasonable;

(g) this court finds that there was injury in the form of abrasion wounds over the lateral aspect of the first plaintiff's ankle. Nonetheless, this court is of the view that the sum of RM8,000 claimed is slightly excessive. This court is awarding a sum of RM5,000;

(h) this court finds that there were multiple scars on the first plaintiff. Nonetheless, this court is of the view that the sum of RM25,000 claimed is slightly excessive. This court is awarding a sum of RM15,000;

(i) this court finds that there was indeed muscle wasting. Nonetheless, this court is of the view that the sum of RM12,000 claimed is slightly excessive. This court is awarding a sum of RM10,000; and

(j) it is the finding of this court that there is a condition of predisposed to secondary osteoarthritis. This court is however of the view that the sum of RM10,000 claimed is slightly excessive. Thus, this court is awarding a sum of RM8,000.

In total, this court is awarding a sum of RM218,000 compared to the plaintiff's claim of RM295,000.

[37] With reference to the issue of contributory negligence raised by the defendant, this court takes the view that there is insufficient evidence to suggest that the injuries suffered by the first plaintiff would not have happened or been mitigated if he had attached his safety harness to the scaffolding prior to the collapsed of the bridge. To my mind, much worse could also have happened to the first plaintiff as the collapse of the bridge would have left him dangling in mid-air akin to a person sentenced to death by way of hanging.

[38] On the issue of the first plaintiff's loss of actual earnings, I duly note of the fact that some of the documentation may not be perfect to support the plaintiff's claim in the sum of RM182,500. Despite such defects this court is still allowing claim under this heading but not for the full sum of RM182,500. This court is deducting the sum of 1/3 of the amount claim. Therefore, by my calculation, the sum allowed is RM121,666.67.

(See *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 64.)

[39] With reference to the cost of future operation, the plaintiff has asked for the cost of future operation procedure at RM42,000. Under this heading, the plaintiff is also seeking for the cost of operation and pain and suffering for hip replacement. En Razlan Hadri, learned counsel for the plaintiff has informed this court that the plaintiff is abandoning the claim for the cost of hip replacement. In the above circumstances, this court is allowing only a sum of RM5,000 being the costs for removing screws and incidentals thereto and RM5,000 for pain and suffering (total allowed under this heading is RM10,000).

[40] The plaintiff's claim for the costs of prosthesis, will be dealt with in the later part of this judgment.

[41] Under heading C5 of the plaintiff's written submission, the plaintiffs are claiming for cost of care and second plaintiff's loss of earnings. Firstly, there are numbers of authorities which states that a person akin to the status of the second plaintiff as a foreigner on a social visit pass cannot work in Malaysia and it is illegal (see *Chua Kim Suan (Administratrix of the Estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394). Be that as it

may, there are also authorities which recognizes that despite the prohibition from employment, persons such as the second plaintiff, have the right to find a means to live which is equated to the right to life (see *Tan Phaik See v Multi Purpose Insurance Berhad* [2004] 6 MLJ 474; [2004] 7 CLJ 289). In a situation where, the second plaintiff's husband is incapacitated due to his injuries, I find that was permissible for the second plaintiff to work.

[42] At the same point in time, a plethora of cases also have allowed, for the cost of care by a wife or family to be factored in as even if the plaintiff was to hire someone to take care of him during the time he was hospitalized, such costs are recoverable (see *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885). In this case, instead of allowing the full sum of RM69,350 as claimed by the second plaintiff, this court is deducting the sum 50% from the amount claimed due to the lack of documentation to prove the second plaintiff's actual salary. By my calculation the sum allowed is RM34,675.

[43] Going back to the issue of prosthesis, we are going back and forth that is why this case took a long time consider the point the first plaintiff wanted the bionic arm, the authority submitted to me shows that there was an earlier Court of Appeal decision which disallowed the plaintiff in that case decision from being given bionic arm (*Chua Kay Hock & Anor v Lee Hoon Poi* [2022] 6 MLJ 88). In deciding on this issue, I agree with the position of law taken by both counsel for the plaintiff and the third party: En Razlan Hadri and En GK Ganesan respectively that the first plaintiff ought to be put in the nearest position before the accident occurred. In my mind, if I agree to give the cheaper version of the prosthesis arm, the will not come near to the position before the accident and similarly if I were to give the bionic arm it would still be not good enough given the practicality of the sum involve ie approximately RM2.6m, as it still will not allow the first plaintiff to be gainfully employed as a plasterer like he was, before the accident occurred. Furthermore, the first plaintiff had refused to be examined by the defendant's expert as to whether the bionic arm was suitable to first plaintiff's physic or capabilities.

[44] This the court takes cognisance of the fact that the claim for prosthesis is one of general damages for which any award of damages made should not be seen to unjustly enrich a plaintiff in any particular case. In finding that both types of prosthesis arm suggested by the plaintiffs and defendant's expert will not be able to put the plaintiff back to his original condition, this court takes the view that the first plaintiff will require assistance both physical and monetary assistance for the rest of his life be that by his wife or children or a

helper as the case may be. As it is not possible to place the plaintiff in a position closest to his original state, this court opines that an award of damages in the sum of RM1.2m would suffice.

COURT'S ANALYSIS AND FINDINGS ON THE THIRD PARTY PROCEEDINGS CAUSE OF ACTION

[45] With regards to the case between defendant and third party, it was my initial view that the third party had failed to show that the defendant is estopped from pursuing the present case against them based on the principles of election and the representation that the third party will not be sued if they agreed to testify in favour of the defendant. In fact, counsel for the third Ms Juliana Solomon had conceded that such a case was never put forward to the defendant's witness.

[46] Despite the above initial finding, my further reading on the issue of *res judicata* and *obiter dicta*, finds that as TY Lin was not a party to the proceedings in the first suit and that the issue of whether TY Lin was responsible for the collapse of the bridge was not an issue for determination before the court there, the judgment of Lee Swee Seng J and that of the Court of Appeal cannot be made to bind them. In opining so, I am guided by the decision in *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 which stated the following:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, *the earlier judgment must* in the terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49; [1964] AC 993, *'necessarily and with precision' determine the point in issue*, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellant to pay the respondent for work done for them at their request. He did no do so. We do not, with respect see how he could succeed. (Emphasis added.)

(See also *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; *Thoday v Thoday* [1964] 1 All ER 341.)

[47] In this regard, I am distinguishing the case of *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, relied upon by learned counsel for the defendant, Ms Shirley Ho. Despite the volumes of pages written by the learned judge in the first suit, whatever was said against TY Lin was only *obiter dicta* and does not amount to a binding conclusion on them.

[48] I also take the view that the principles of res judicata as relied upon by the defendant cannot be made to apply in a case such as the present suit before me given the fact that TY Lin was never given an opportunity to defend itself as a party to the first suit bearing in mind that the collapsed of the bridge caused

not only millions of ringgit but also the loss of life and bodily injury to a number of individuals. This to my mind tramples on the rules of natural justice (see the Federal Court decision in *Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185).

[49] On a separate note, this court is of the view that there was no evidence adduced (apart from the decision in the first suit), to prove that the third party was at fault for the collapse of the bridge or liable for negligence in contract or in tort.

[50] For the same reasons as mentioned in para [48] above, this court disagrees with the defendant's contention that the conduct of the defendant agreeing to place the judgment of the first suit in Part A of the common bundle of documents is tantamount to an admission by the third party. As stated earlier, the findings of the learned Judge in the first suit on TY Lin's liability were mere obiter dicta and the inclusion of the judgment in Part A of the common bundle of documents does not in any way change the status of his findings on TY Lin ie the third party herein. In the upshot, the third party claim against TY Lin is hereby dismissed.

CONCLUSION

[51] In light of the above, it is this court's finding that the defendant is liable for injuries suffered by the plaintiff. The plaintiffs' claim is hereby allowed in part and based on the following orders:

(a) general damages for the first plaintiff:

(i) for the mangled left upper limb at the level of mid forearm — crush injury of the left injury of the left upper limb at the level of the forearm (open fracture left radius ulna) this court award the sum RM70,000;

(ii) for pelvis fractures — right ilium fracture extending to the posterior column acetabulum and superior pubic ramus this court award the sum of RM65,000;

(iii) the claim for right femoral head fracture is not allowed;

(iv) this court allowed RM10,000 for left calcaneal hairline fracture;

(v) this court allowed the sum of RM27,000 for the closed fracture left medial malleolus.

(vi) for the laceration wound over the heel around 1 cm with bone exposed this court award RM8,000;

(vii) this court award RM5,000 for abrasion wounds over the lateral aspect of the ankle;

(viii) for multiple scars the sum allowed RM15,000;

(ix) for muscle wasting the sum allowed RM10,000;

(x) for predisposed to secondary osteoarthritis the sum allowed RM8,000;

(xi) for loss of future earnings RM121,666.67;

(xii) for the cost of future operation or procedure this court award RM10,000 (RM5,000 for Pin Removing Procedure and RM5,000 for pain and suffering); and

(xiii) alternative award on the first plaintiff's claim for a bionic prosthesis arm, this court award the sum of RM1.2m.

(b) general damages for the second plaintiff: RM34,675 for the cost of care provided to the first plaintiff.

Note: 30% of the amount awarded to the plaintiff will be deducted for vicissitudes of life (see COA decision in *Chan Yung Sheng v Zakaria bin Awang* [2019] 10 MLJ 506).

COSTS

[52] Having heard brief submissions by counsels on the issue of costs of the proceedings, I hereby make the following orders:

(a) as between the plaintiff and the defendant, cost is awarded at RM80,000; and

(b) as between the defendant and the third party, cost is awarded at RM35,000 (RM15,000 for the trial and RM20,000 for getting up).

Plaintiff's claim allowed in part and defendant's third-party claim dismissed.

Reported by Nabilah Syahida Abdullah Salleh